

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES WILLIAM TRAMMEL II,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 229168

Tuscola Circuit Court

LC No. 99-007617-FH

Before: Holbrook, Jr., and Jansen and Wilder, JJ.

WILDER, J., (*concurring in part and dissenting in part.*)

I join with the majority in affirming defendant's convictions, but respectfully dissent from the majority's remand to a different judge for sentencing. I would also remand for re-sentencing, but I would remand to the original trial court and not to a different judge.

The majority concludes that the trial court demonstrated clear bias against the defendant, and finds that remand for re-sentencing to a different judge is required to preserve the appearance of justice. *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998). I disagree. There is no question that in imposing sentence, the trial court used strong language in making its findings about the crime defendant committed, as well as defendant's conduct throughout the proceedings. The trial court rejected defendant's attempt to portray the victim as street smart, someone having a prior criminal record and having been previously incarcerated, instead concluding that defendant had sexually assaulted a naïve, 18 year old young man. In so finding, the trial court specifically noted that the jury had rejected defendant's theory of the case and found him guilty, and further found that the evidence demonstrated predatory conduct by defendant in his pursuit of the young victim.

The trial judge also relied on the jury's rejection of defendant's theory as support for his denial of defendant's request that the trial court order a post-conviction polygraph examination of defendant. In addition, the trial court noted defendant's prior fraud conviction and observed that a polygraph might be incapable of discerning whether defendant's responses were in fact truthful.

Finally, the trial court commented on the frivolity of defendant's motion for *Ginther* hearing, rejected defendant's baseless claim that the presentence report prepared by the Probation Department had shown undue deference to the sentence desired by the prosecutor, and

found that the defendant's criminal record showed an escalation by defendant in the seriousness of participation in criminal activity, such that the potential for rehabilitation was minimal.

In *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999), this Court stated:

Absent actual personal bias or prejudice against either party or the party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495, 548 N.W.2d 210 (1996). A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id.* at 497, 548 N.W.2d 210. Where a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. *Id.* at 496, 548 N.W.2d 210, citing *Liteky v United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed. 2d 474 (1994). *Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality. Cain, supra* at 497, n. 30, 548 N.W.2d 210. [Emphasis added.]

On the record before us, I would conclude that each of the statements made by the trial judge reflect opinions based on facts introduced or events that occurred during the course of the proceedings in this case. A trial judge, faced with what he or she finds to be demonstrated, reprehensible conduct by the defendant in both the commission of the crime of which defendant has been convicted, and in the attempted manipulation of the trial proceedings, may appropriately comment on these highly relevant matters of record, in strong terms if necessary, in fashioning defendant's sentence. Because I would conclude that the trial court's comments reflect opinions based on the record and not bias, I dissent from that portion of the majority opinion remanding for sentencing before a different judge.¹

/s/ Kurtis T. Wilder

¹ To the extent the majority relies on the trial court's expressed disdain of the legislative sentencing guidelines in remanding for sentencing to a new judge, I would note that the sentencing in this case occurred some 16 months before the Supreme Court remanded a case for resentencing before this same trial court in *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001). Nothing in this record suggests the trial court is unable or unwilling to heed the Supreme Court's clarification in *Hegwood* of the requirements imposed on trial courts when imposing a sentence which departs from the applicable guidelines range.